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## ‘Constitutional Dialogue’: An Overview

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### 1. Introduction

‘Constitutional dialogue’ has rapidly become more important in processes of public decision-making.<sup>1</sup> Calls for ‘dialogue’ are resorted to when conflicts that cannot be simply solved by legal logic arise. In addition, references to the term ‘dialogue’ in scholarly writing on constitutional law have surged in the last decade.<sup>2</sup> The potential of ‘dialogue’ has been explored in various publications that are concerned with the legitimating, constituting or instrumental functions of public law.<sup>3</sup> Furthermore, in legal practice the term ‘dialogue’ is sometimes employed as if it were a ‘term of art’.<sup>4</sup> At the same time, due to a lack of any legal meaning constitutional dialogue often amounts to a convenient label suggesting ‘mutual learning and improvement’.<sup>5</sup>

Yet, despite this popularity – or perhaps partly *because of* the easy appeal of the term – the academic and the practical legal community still appears to be unsure what qualifies as a ‘dialogue’ either in practice or in theory or what implications to attach to the qualification. As a result the concept is often used

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1 See for example T.R.S. Allan, ‘Constitutional Dialogue and the Justification of Judicial Review’, 2003 *Oxford Journal of Legal Studies* 23, pp. 563-584; D. Barak-Erez, ‘The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue’, 2004 *International Journal of Constitutional Law* 2, pp. 611-632; B.O. Bryde, ‘The Constitutional Judge and the International Constitutionalist Dialogue’, 2006 *Tulane Law Review* 80, pp. 203-219; P. Chen, ‘The Constitutional Politics of Roads and Canals: Inter-Branch Dialogue over Internal Improvements’, 2006 *Whittier Law Review* 28, pp. 625-662; V.C. Jackson, ‘Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse’, 2004 *Montana Law Review* 65, pp. 15-40; R.J. Krotoszynski, ‘Constitutional Flares: On Judges, Legislatures and Dialogue’, 1998 *Minnesota Law Review* 83, pp. 1-62; K. Roach, ‘Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience Symposium: Globalization and the Judiciary’, 2005 *Texas International Law Journal* 40, pp. 537-576.

2 See C. Bateup, ‘The Dialogic Promise – Assessing the Normative Potential of Theories of Constitutional Dialogue’, 2006 *Brooklyn Law Review* 71, p. 1109.

3 As for the legitimating function see for example Allan, *supra* note 1; A. Petter, ‘Taking Dialogue Theory Much too Seriously’, 2007 *Osgoode Hall Law Journal* 45, no. 1, pp. 147-168; B.M. Bakker, ‘Blogs as Constitutional Dialogue: Rekindling the Dialogic Promise?’, 2008 *New York University Annual Survey of American Law* 63, pp. 215-267. As for the constituting function, see Barak-Erez, *supra* note 1; Jackson, *supra* note 1. As for the instrumental function, see for example Chen, *supra* note 1; P.M. Hogg et al., ‘Charter Dialogue Revisited – or Much Ado about Metaphors Charter Dialogue: Ten Years Later’, 2007 *Osgoode Hall Law Journal* 45, pp. 1-65.

4 E.g., in a draft resolution of the European Parliament (RC-B5-0405/2001, 7 June 2001, PE 305.588) the term ‘transatlantic constitutional dialogue’ was used for an exchange between the US Congress and the European Parliament.

5 For instance, the European Court of Human Rights labels its symposia for judges ‘Dialogues between Judges’, M.H.L.K. Claes & M.C.B.F. de Visser, ‘Are You Networked Yet? On Dialogues in European Judicial Networks’, 2012 *Utrecht Law Review* 8, no. 2, p. 105.

without further definition.<sup>6</sup> The employment of 'constitutional dialogue' in academic literature varies from casual uses as a metaphor to proclamations along the lines of the concept having become 'part of mainstream discourse regarding the separation of powers'<sup>7</sup> and references to 'constitutional dialogue theory'.<sup>8</sup>

These multiple modes of employment make it clear that the content and scope of 'constitutional dialogue theory' is not evident and needs further academic attention. As it appears that we are dealing with an 'essentially contested concept'<sup>9</sup> – much like 'democracy' – ongoing competition regarding its interpretation is part of its usefulness. 'Dialogue' has a variety of meanings, all of which are based on a shared archetypical notion. This, however, leaves room for persistent debate about the specific features and – most importantly – proper use of the concept. The contested nature of the concept is illustrated by the fact that in contemporary legal scholarship 'constitutional dialogue' is employed in connection with different theoretical approaches, which are not mutually exclusive, ranging from explanatory accounts to a set of normative principles on which constitutional practices can be based.<sup>10</sup> As a reaction to the lack of clarity surrounding an increasingly popular concept, this paper aims to provide an overview of various strands of literature on constitutional dialogue as well as a practical guide to navigating this literature for scholars who are considering employing this concept in their research. Our central question is the following: *what possibilities of application in legal research does the concept of constitutional dialogue provide, considering the existing conceptualizations and applications in legal literature?*

We proceed by briefly explaining our approach to answering the presented research question (Section 2). Subsequently we provide a deeper insight into the concept of constitutional dialogue (Section 3). For this purpose, we first analyze what constitutes a constitutional dialogue and how it is conceptualized in academic terms (Section 3.1). We then provide a brief overview of theoretical accounts identified within the studied literature (Section 3.2.1), whereupon these will be further discussed on the basis of various institutional settings in which the concept of constitutional dialogue is employed (Sections 3.2.2–3.2.5). Based on this review, we will address the caveats encountered in different usages of the concept of 'constitutional dialogue' (Section 4). Finally, we present an overview of the broader implications of our findings and consider possibilities and pitfalls with regard to the application of the concept within legal research (Section 5) and conclude by a summary of our findings (Section 6). In line with the theme of this special issue we provide some illustrations from current constitutional debates in the Netherlands.<sup>11</sup>

## 2. Research design and methodology

Precisely because we are interested in the variety of uses of the concept of 'constitutional dialogue' in the literature, we conducted a systematic literature review. This has allowed us to categorize what is already known about constitutional dialogue, what underlying concepts and theoretical approaches are relevant to constitutional dialogue and which significant controversies, inconsistencies and unanswered questions are present.<sup>12</sup> The systematic search resulted in a large variety of sources. The most relevant – i.e. articles clearly utilizing the concept of constitutional dialogue as the main concept in the publication – among

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6 A helpful general definition of 'dialogue' can be found in W. Barnett Pearce & K.A. Pearce, 'Taking a communication perspective on dialogue', in R. Anderson et al. (eds.), *Dialogue. Theorizing Difference in Communication Studies*, 2004, pp.39-56: '[t]he defining characteristic of dialogic communication is that all of these speech acts are done in ways that hold one's own position but allow others the space to hold theirs, and are profoundly open to hearing others' positions without needing to oppose or assimilate them'.

7 C. Mendes, 'Book review of Jeffrey Goldsworthy, ed., *Interpreting Constitutions: A Comparative Study*, Oxford University Press', 2006, 2008 *I.CON*, p. 6.

8 For example Bakker, *supra* note 3; G. Dor, 'Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective', 2000 *Indiana International & Comparative Law Review* 11, pp. 1-36.

9 Meeting the basic conditions of 'appraisiveness', 'intern complexity', 'diverse describability', 'openness' and 'reciprocal recognition', see W.B. Gallie, 'Essentially contested concepts', *Proceedings of the Aristotelian Society* 1956-57, pp. 167-220. The authors would like to thank Maurice Adams for the suggestion.

10 Based on Bateup, *supra* note 2.

11 The concept of 'constitutional dialogue' seems to have gained a footing in Dutch legal academia since A.W. Heringa, *Constitutionele partners, Rechterlijke toetsing als instrument voor samenwerking tussen rechter en wetgever*, inaugural lecture Maastricht University, 1996.

12 A. Bryman, *Social Research Methods*, 2008, p. 81.

these have been selected based on titles, abstracts and conclusions. To avoid bias with regard to the selected sources, we added relevant publications using the technique of snowball sampling – considering the most cited publications on constitutional dialogue theory within our selected sources – and by consulting a group of experts regarding our initial literature review.<sup>13</sup>

After a general reading of the results, a sample of 16 publications has been scored or analyzed for a number of indicators, drafted based on our research aim and question.<sup>14</sup> First, we considered whether or not an explicit or implicit definition of the concept of dialogue and constitution was provided and, if so, what particular elements of ‘constitutional dialogue’ it consisted of. Our preliminary research had shown that some authors are not interested in ‘dialogue’ as such, but in explaining or highlighting certain aspects of constitutional practice – thus using the concept as a ‘lens’ – and others were explicitly focused on the qualities of ‘dialogue’ that might be of use when shaping public decision-making – thus developing ‘dialogue’ as a method. Therefore we designed a framework of analysis for determining in which manner the author applied the concept.<sup>15</sup> Through this framework, we also collected data on the institutional setting, or, the ‘participants’ within the dialogue: to which actors did the author refer when using the concept of constitutional dialogue? Finally, we considered the theoretical stance in the publication. Did the author explicitly refer to ‘constitutional dialogue theory’ and what – explicit or implicit – theoretical approach was taken? Applying this framework to the selected sources provided a rigorous overview of the academic employment of the concept of constitutional dialogue, which after a synthesis and supplementation of further relevant findings constituted the findings as discussed below.

### 3. Overview of the literature on constitutional dialogue

#### 3.1. Defining constitutional dialogue

When browsing the literature on constitutional dialogue, the first problem encountered is the definitional bleakness surrounding the concept. The absence of a clear and generally accepted definition of ‘constitutional dialogue’ in the publications studied contributes to the current diversity in modes of employment of the concept. If we want to consider the possibilities of academically applying ‘constitutional dialogue’, at the very least a working definition is needed. Consulting the existing literature provides us with some clues for this important step. Bakker, for example, states that ‘constitutional dialogue encompasses the idea that different governmental branches and people interact in ways that shape the dominant views of constitutional interpretation over time.’<sup>16</sup> Dor refers to the dictionary definition and describes dialogue as ‘an open and frank interchange, exchange and discussion of ideas and opinions in the seeking of mutual harmony.’<sup>17</sup> Other authors have been far less concerned with certain detailed definitions but have instead described a general narrative that provides a listing of activities that dialogue should encompass. Alternatively, instead of defining or describing the concept, related terms such as ‘conversation’ or ‘interaction’ are simply mentioned in the same breath.<sup>18</sup> An overview of recurring

13 The group of experts has been consulted during the workshop on constitutional dialogues held at Tilburg University, 14 September 2012.

14 For the questionnaire used, see Annex 1. The 16 publications were: Allan, *supra* note 1; Petter, *supra* note 3; Bakker, *supra* note 3; Barak-Erez, *supra* note 1; Bateup, *supra* note 2; C. Bateup, ‘Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective’, 2007 *Temple International and Comparative Law Journal* 21, pp. 1-58; Bryde, *supra* note 1; Chen, *supra* note 1; Dor, *supra* note 8; C.A. Fraser, ‘Constitutional Dialogues between Courts and Legislatures: Can We Talk Courts and Legislatures: The Terms of the Discourse’, 2005 *Forum Constitutionnel* 14, no. 3, pp. 1-32; Hogg et al., *supra* note 3; Jackson, *supra* note 1; L.A. Kloppenberg, ‘Telling a Constitutional Story: Examples of Constitutional Dialogue Teaching Constitutional Law’, 2004 *St. Louis University Law Journal* 49, pp. 685-690; Krotoszynski, *supra* note 1; Roach, *supra* note 1; M. Sidel, ‘Analytical Models for Understanding Constitutions and Constitutional Dialogue in Socialist Transitional States: Re-Interpreting Constitutional Dialogue in Vietnam Comparative Constitutionalisms: The Remaking of Constitutional Orders in South-East Asia’, 2002 *Singapore Journal of International and Comparative Law* 6, pp. 42-89. The codebook that guided the assessment of the relevant articles is added in Annex 1.

15 Cf. Section 5.1 below and Annex 1 sub. f.

16 See Bakker, *supra* note 3, p. 216.

17 See Dor, *supra* note 8, pp. 17-18. A formal dialogue takes place when the legislative action adds nothing to the final articulation of the constitutional solution; it does not add any content to the court’s decision, except for ‘rubber-stamping’ it with the relevant legislative process. A formal dialogue occurs when the final formal act is that of the legislature, but the final words are those of the court. This type of response is characterized by the reluctance of one or more participants to acknowledge their overreaching or to thoroughly ponder the others’ objections in considering alternatives.

18 See, e.g., B. Friedman, ‘The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy’, 1998 *New York University Law Review* 73, pp. 333-342.

elements in the literature on constitutional dialogue that may be of use in defining the concept is provided below.

Publications employing the concept of constitutional dialogue tend to refer to *equality* between dialogic partners, or at least a (temporary) ignoring of power relations, often pointing to a shift from hierarchy to heterarchy as a basic structure within which the disciplining of public power takes place.<sup>19</sup> This feature is related to an increasing informality in processes that shape and control public power. Sometimes, as in the Canadian 'constitutional dialogue' (see below), this means that actors permit themselves more freedom in the exercise of their constitutionally defined tasks. At other times, increased interdependency means that actors responsible for public decision-making go beyond their traditional mandates in the name of 'dialogue'.

A further recurring feature is the requirement of a certain *deliberative quality* to the interaction in order for dialogue to be a legitimating factor in processes of public decision-making.<sup>20</sup> Although participants still have agendas and interests to defend, they connect these to their relationships with their dialogic partners and the agendas and interests those partners may have, even when they are conflicting. The learning process that public actors experience when they interact with (foreign) counterparts also plays a role in constitutional dialogue literature.<sup>21</sup> One specific example can be found in Jackson's work, in which 'dialogue' is considered a *transnational process* leading to the incorporation of certain human rights norms into national constitutions.<sup>22</sup>

The 'dialogue' does not need to be explicitly shaped as such. Courts or other constitutional actors do not need to acknowledge that they are engaged in a dialogue.<sup>23</sup> In the case of courts, for instance, they can implicitly invite other relevant actors to react by phrasing their judgments in a certain way. In the same vein, procedures that may seem very hierarchical, such as the preliminary reference procedure in EU law, can in practice acquire a 'dialogical character' if the courts involved create leeway for input. Claes and De Visser have drawn attention to the confusing nature of these 'silent dialogues' for the actors involved.<sup>24</sup> Constitutional dialogues can also be 'silent' in the sense that a lack of reaction can be taken as a nod of approval.<sup>25</sup>

Furthermore, instances of dialogue may be called 'constitutional' because of their *aspiration* to contribute to, implement or even shape the basic norms that govern the actions of public entities and their exercise of coercive power in particular.<sup>26</sup> Of course this contribution cannot be a one-off. On the other hand, the codification of 'dialogical mechanisms', such as explicitly present in some constitutions (such as Article 33 of the Canadian Charter), is not crucial for the qualification of an action as 'constitutional'; an *institutionalized practice* (a 'pattern' in our questionnaire, see Annex 1) suffices.

Considering the aforementioned, we arrive at the following working definition of constitutional dialogue: *a sequel of implicitly or explicitly shaped communications back and forth between two or more actors characterized by the absence of a dominant actor – or at least by a bracketing of dominance –, with the shared intention of improving the practice of interpreting, reviewing, writing or amending constitutions.* This definition expressly leaves open the question of which actors can be involved as we found that the concept of constitutional dialogue has been employed in various institutional settings, with different but overlapping theoretical underpinnings. For our purpose – considering exactly the use of 'constitutional dialogue in a comprehensive manner' – limiting our working definition to specific types of actors would be self-defeating. In our view, the academic relevance of the concept is not limited to a specific institutional setting. To support this argument, and to provide further insight into the applicability of the concept of constitutional dialogue, the next section will deal with several institutional settings and their corresponding theoretical approaches.

19 See for example Allan, *supra* note 1, p. 584. He refers to a 'balanced bower between law-giver and interpreter'.

20 L. Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures', 2005 *International Journal of Constitutional Law* 3, p. 617, cited in Claes & De Visser, *supra* note 5.

21 See Barnett Pearce & Pearce, *supra* note 6. On cross-border learning specifically, see Claes & De Visser, *supra* note 5.

22 See Jackson, *supra* note 1.

23 See Claes & De Visser, *supra* note 5.

24 *Ibid.*

25 J. Resnik, 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry', 2006 *Yale Law Review* 115, p. 1564.

26 N. Walker, 'The Idea of Constitutional Pluralism', 2002 *Modern Law Review* 65, no. 3, pp. 317-359.



### 3.2. *Theorizing constitutional dialogue*

The concept of constitutional dialogue is most often referred to by scholars with regard to the proper role of the judiciary in relation to the executive and legislative branches of government.<sup>27</sup> The classical statement by Bickel that ‘judicial review is a counter-majoritarian force in a legal system’<sup>28</sup> has led scholars to engage in a debate to either sustain or circumvent the majoritarian difficulty, using the concept of ‘constitutional dialogue’ in many cases.<sup>29</sup> But although most of the literature on constitutional dialogue brings in courts as one of the dialogical partners, the term can (and does) take on a broader meaning. Dialogue not only takes place between lawmakers and addressees, but also across different types of decision makers, such as legislators, judges, regulators and across traditional constitutional branch divisions. In this section we take the various institutional settings in which the concept of constitutional dialogue is employed – listing the dialogic partners – as a hinge to connect practical applications of ‘dialogue’ to theoretical accounts of the phenomenon. We briefly introduce these accounts below, distinguishing between a) more comprehensive, institutionalist constitutional dialogue theories, b) theories that use the concept of dialogue more subtly and c) theories that do not use the concept per se but deserve to be mentioned because of similar premises (Section 3.2.1). We proceed by illustrating the findings and premises of these theories for the following combinations of actors: courts and legislatures (Section 3.2.2); courts and courts (Section 3.2.3); courts and citizens (Section 3.2.4); and non-judicial actors and citizens (Section 3.2.5).

#### 3.2.1. *A brief overview of theories*

The largest category of theories that use the concept of ‘constitutional dialogue’ can be labelled ‘institutionalist theories.’ They have in common that they ‘focus on the institutional process through which decisions about constitutional meaning are made’<sup>30</sup> rather than on the interpretive criteria and techniques that judges use or should use. Institutionalists do not necessarily disregard context but place a strong focus on the role of institutions. In most of these theories where constitutional development is at issue, the improvement of the process of constitutional norm formation somehow takes place through a form of interaction between courts, on the one hand, and a variety of other actors on the other.

The most systematic overview of institutionalist constitutional dialogue theories to date has been presented by Bateup.<sup>31</sup> She distinguishes coordinate construction theories, theories of judicial principle, equilibrium theories, and partnership theories. Coordinate construction theories present the oldest conception of constitutional interpretation as a shared enterprise between the courts and the political branches of government, as first espoused by James Madison, later by Thomas Jefferson.<sup>32</sup> The assumption which is common to the theories under this heading is that each branch of government must co-ordinate with the others, yet remain independent, and that each branch has primary responsibility for interpreting the Constitution as it concerns its own functions. Theories of judicial principle, on the other hand, tend to propose that judges perform a unique dialogic function based on their special institutional competence in relation to matters of principle. Equilibrium theories focus on the judiciary’s capacity to facilitate society-wide constitutional debate.<sup>33</sup> The final category of institutionalist theories which is relevant to the concept of ‘dialogue’ goes under the heading of partnership theories which tend to go the furthest in terms of updating our views on constitutional structures. These theories draw attention to more distinct judicial and legislative functions performed by different branches of government. They recognize that each branch of government learns from the specific dialogic inputs of the other branches in an institutionally diverse constitutional order. Judicial and non-judicial actors are thus conceived as

27 See Dor, *supra* note 8, p. 1.

28 A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 1962.

29 See Dor, *supra* note 8, p. 1. See P.W. Hogg & A.A. Bushell, ‘The Charter dialogue between courts and legislatures’, 1997 *Osgoode Hall Law Journal* 25, pp. 75-124; P.W. Hogg & A.A. Thornton, ‘Reply to “Six Degrees of Dialogue”’, 1999 *Osgoode Hall Law Journal* 37, pp. 529-536. K. Roach, ‘Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures’, 2001 *Canadian Bar Review* 80, pp. 481-533.

30 See Bateup, *supra* note 2, p. 1118.

31 See Bateup, *supra* note 2.

32 On Madison’s position, see R.A. Burt, *The Constitution in Conflict*, 1992, Chapter 2. On Jefferson’s position see L. Fisher, *Constitutional Dialogues: Interpretation as Political Process*, 1988, p. 238. References derived from Bateup, *supra* note 2.

33 See Bateup, *supra* note 2, p. 1112.

equal participants in constitutional decision-making, both of whom dialogically contribute to the search for better answers as a result of their unique institutional perspectives.<sup>34</sup>

As the first of the category of theories which are not necessarily theories of constitutional dialogue, but theories that are somehow relevant to the concept, 'contextualist' constitutional law theories come to mind. Compared to the 'institutionalist' theories set out above, 'contextualist theories' employ the concept of 'dialogue' in a much looser fashion. Best known as a normative theory of constitutional interpretation and as such as an alternative to 'originalism', 'contextualism' can also represent an explanatory approach to constitutional analysis. Befitting their basic idea that 'context matters' (cf. 'institutions matter' for institutionalism), for contextualists creating and interpreting constitutions is *necessarily* a 'dialogue' in an empirical sense, since the shaping of constitutional law always occurs through human interaction in a social, political and historical context.<sup>35</sup> Constitutional dialogue becomes the obvious, even natural, way in which constitutional norms are shaped and interpreted. Furthermore, studies on constitution-writing have also embraced the concept of 'constitutional dialogue' and attempted to use it as a normative theoretical device. Sidel, for instance, uses it as an alternative to 'constitutional instrumentalism', which in his view has dominated the scholarly understanding of socialist constitutions.<sup>36</sup>

Finally, as mentioned, there are theories that do not use the concept of 'dialogue' as such, but deserve mentioning here, because of a similarity in purpose or starting points. Two such recently popular theories of public decision-making are new governance theory and regulation theory. As Gerards has remarked, constitutional dialogue theory and new governance theory can point in the same direction in the sense that both seek solutions for the limits of parliamentary scrutiny in contemporary legal orders.<sup>37</sup> Insights from regulation theory, on the other hand, can serve as being complimentary to concepts related to 'constitutional dialogue', especially since both seek to get to grips with the increasing heterarchy in the fundamental structures of institutionalized public power.

### 3.2.2. Courts and legislatures (and governments)

The core of constitutional dialogue between the judiciary and the legislature is that they engage in a conversation about constitutional meaning, in which both actors (should) listen in order to learn from each other's perspectives, which can then lead to modifying their own views accordingly. By 'institutional dialogue'<sup>38</sup> is meant that 'courts and legislatures participate in a dialogue aimed at achieving the proper balance between constitutional principles and public policies and the existence of this dialogue constitutes a good reason for not conceiving of judicial review as democratically illegitimate'<sup>39</sup> and applies 'anywhere legislatures are able to reverse, modify, avoid, or otherwise reply to judicial decisions nullifying legislation'.<sup>40</sup> In this way, 'dialogue' represents the 'middle way between judicial supremacy on the one hand, and legislative supremacy on the other'.<sup>41</sup> As the legislature, helped by institutional mechanisms such as 'declarations of incompatibility', has the possibility to modify judicial decisions regarding constitutional matters, the sharp edges are being removed from the 'counter-majoritarian dilemma'.

The most prominent example of 'constitutional dialogue' is related to the Canadian Charter, where the Constitution itself features the possibility of dialogue between the legislator and the high court.<sup>42</sup> This very specific branch of dialogue theory 'has taken on a life of its own and become the predominant theoretical approach to the Charter'.<sup>43</sup> According to Gardbaum, '[i]t has since spread to the U.K. and

34 A clear example of this type of theory is the work of Janet Hiebert, see her *Charter Conflicts: What is Parliament's Role?*, 2002.

35 See Kloppenborg, *supra* note 14.

36 See Sidel, *supra* note 14.

37 J. Gerards, 'Wisselwerking tussen wetgever en rechter – naar een betere dialoog?', in R. de Lange (ed.), *Wetgever en grondrechten*, (Publikaties van de Staatsrechtkring no. 12), 2008, note 69, pp. 174-175.

38 See Tremblay, *supra* note 20, p. 617.

39 Ibid. See also Hogg et al., *supra* note 3.

40 Ibid.

41 See Claes & De Visser, *supra* note 5.

42 An important author who has published about the Canadian constitutional system by using the concept of dialogue is Peter Hogg. See also, R.F. Devlin, 'The Charter and Anglophone Legal Theory', 1997 *Review of Constitutional Studies* 4, no. 1, p. 31, stating that 'about this apparent faith in dialogism (...) at this point I simply want to highlight that almost everyone seems to be doing it'.

43 S. Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism', 2010 *International Journal of Constitutional Law* 8, pp. 167-206.

Australia, where the new model as a whole is often referred to as “the dialogue model” and/or is justified on the basis that it promotes “democratic dialogue”.<sup>44</sup> The claim that ‘both courts and legislatures share responsibility for making judgments about constitutional values and for assessing the reasonableness of their own actions in light of those values’<sup>45</sup> can be applied and is being applied beyond the Canadian context, though.<sup>46</sup>

While courts and legislatures share responsibility for respecting constitutional values, each has a distinct relationship to a constitutional conflict. This is not only because they are differently situated, but also because they each bring distinct and valuable perspectives to constitutional judgment given their different institutional characteristics and responsibilities.<sup>47</sup> All varieties of institutionalist constitutional dialogue theories assume that interpreting and defining rights is at the core of judicial decision-making. However, they differ as to whether this task should be reinforced by the dialogue or rather shared with the legislature. However, most institutionalist constitutional dialogue theories ‘suggest (...) that judicial review will need to be weakened, compared to traditional models, before it can be counted fully legitimate.’<sup>48</sup>

Coordinate construction theories and theories of judicial principle are the most traditional in this sense. The former claim that courts and legislatures enter into the dialogue from their own distinct positions.<sup>49</sup> Theories of judicial principle are more court-focused, placing the dialogic qualities mainly on the side of the judiciary.<sup>50</sup> Both theories accommodate two different perspectives on the source and function of the dialogue. The first, ‘reactive’, perspective suggests that dialogue is generated as a result of the political branches checking principled court interpretations in the event of judicial error.<sup>51</sup> The other perspective, that can be characterized as geared towards ‘prevention’, focuses on how dialogue emerges through the legislative articulation of policy objectives when the legislature responds to judicial decisions.<sup>52</sup> Partnership theories subscribe to the latter perspective, hypothesizing that dialogue often begins with legislators when they initially consider whether legislation is consistent with written constitutional norms.<sup>53</sup> It then continues in individual cases, where the deliberations of the legislature are conveyed through legal argument and where the deliberations of the court are revealed through its judgments. The dialogue subsequently returns to the legislature, which considers if and how to respond to the court’s decision.<sup>54</sup> One starting point of partnership theories, and one in which they differ from coordinate construction theories and theories of judicial principle, is that they do not presume that courts are better able to resolve disagreements about the meaning of rights in a principled manner.<sup>55</sup>

44 Ibid.

45 See Hiebert, *supra* note 34, pp. 50-72.

46 See Bateup, *supra* note 2, p. 1169.

47 J. Hiebert, ‘Parliament and the Human Rights Act: can the JCHR help facilitate a culture of rights?’, 2006 *International Journal of Constitutional Law* 4, no. 1, pp. 1-38.

48 R. Dixon, ‘Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited’, 2007 *International Journal of Constitutional Law* 5, no. 3, pp. 391-393.

49 For the employment of this theory in this institutional setting see L. Fisher, *Constitutional Dialogues: Interpretation as Political Process*, 1988; N. Devins & L. Fisher, ‘Judicial Exclusivity and Political Instability’, 1998 *Virginia Law Review* 84, p. 83; K. Whittington, *Constitutional Construction*, 1999; W.F. Murphy, ‘Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter’, 1986 *The Review of Politics*, 48, no. 3, pp. 401-423; M.S. Paulsen, ‘The Most Dangerous Branch: Executive Power to Say what the Law Is’, 1994 *Georgia Law Journal* 83, pp. 217-345.

50 For the employment of this theory in this institutional setting see Bickel, *supra* note 28; M.J. Perry, *The Constitution, The Courts and Human Rights*, 1982; M.J. Perry, *The Constitution in the Courts*, 1994; J. Agresto, *The Supreme Court and Constitutional Democracy*, 1984; P.R. Dimond, *The Supreme Court and Judicial Choice*, 1989; S. Ingber, ‘Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue’, 1994 *Rutgers Law Review* 46, no. 4, pp. 1473-1688. Focusing solely on courts and legislatures are the authors using constitutional dialogue with regard to the Canadian Charter, Hogg & Thornton, *supra* note 29; P.W. Hogg, ‘The Charter Revolution: Is It Undemocratic?’ 2001 *Constitutional Forum* 12, pp. 1-8; P.W. Hogg, ‘Constitutional Dialogue Under a Bill of Rights’, 2007/2008 *National Journal of Constitutional Law* 23, pp. 127-138; Hogg & Bushell, *supra* note 29; Hogg et al., *supra* note 3; Roach, *supra* note 1; Roach, *supra* note 29; K. Roach, ‘Sharpening the Dialogue Debate: The Next Decade of Scholarship’, 2007 *Osgoode Hall Law Journal* 45, pp. 169-191.

51 See for example Bickel, *supra* note 28.

52 See for example Hogg & Bushell, *supra* note 29; Hogg & Thornton, *supra* note 29; Hogg et al., *supra* note 3; Roach, *supra* note 1.

53 For the employment of this theory in this institutional setting see Hiebert, *supra* note 34; J.L. Hiebert, ‘Hybrid-Approach to Protect Rights – An Argument in Favour of Supplementing Canadian Judicial Review with Australia’s Model of Parliamentary Scrutiny’, 1998 *American Federal Law Review* 26, no. 1, pp. 115-138; J.L. Hiebert, ‘New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights Symposium: Comparative Avenues in Constitutional Law – Innovative Models of Constitutionalism’, 2003 *Texas Law Review* 82; Bateup, *supra* note 2; Bateup, *supra* note 14.

54 See Hiebert, *supra* note 34, pp. 50-51.

55 See Hiebert, *supra* note 34, p. 53.



There are also looser varieties of these theories, in which constitutional dialogue morphs into a more general theory of checks and balances between the judiciary and the legislator. Here 'allowing for a legislative response to judicial decisions'<sup>56</sup> is considered sufficient to constitute 'dialogue'. In a sense all constitutional review of legislation can be seen as a form of dialogue. The very fact that judicial decisions are open to reversal, modification, or even avoidance by the competent legislative body necessarily triggers a 'dialogue', even if it remains implicit. As a more explicit example we may think of the 'declaration of incompatibility' that can be issued by judges in the United Kingdom if they consider that the terms of a statute are incompatible with the UK's obligations under the Human Rights Act, which incorporated the European Convention on Human Rights into UK domestic law.

This brings us to a core point in theoretical accounts of court-legislature relationships (sometimes explicitly including 'governments' as well, see Table 1 below): the 'weakening' of judicial review often turns into a changing of its nature instead and often a tacit strengthening eventually. As the key actors in 'institutional dialogue', judicial actors have a broad responsibility to 'play an active role in countering "blind spots" and "burdens of inertia" in the political process.'<sup>57</sup> As Witteveen has pointed out, in the Dutch discussion about introducing a constitutional review of statutory legislation,<sup>58</sup> the fear of conceding these points is unfortunately predominant.<sup>59</sup>

### 3.2.3. Courts and courts

In other publications the legislature does not necessarily take part in the dialogue. Here, the metaphor is either reserved for cooperation between constitutional or the highest courts or is applied to different levels within the judiciary. There is a burgeoning body of literature on judicial dialogues, which has already fleshed out the concept of dialogue quite a bit, but which is still struggling with the implications of its findings on public decision-making more widely speaking. Also, the literature on intra-judicial dialogue has a less distinct theoretical underpinning than the previous actor pair.

Rosas has distinguished five categories of 'judicial dialogue', distinguishing the basis of the relationship between the courts involved (hierarchical-heterarchical and horizontal-vertical).<sup>60</sup> The first category encompasses dialogues between courts belonging to the same national system, where they are part of a vertical, hierarchical system. The second category is reserved for the special relationship which exists between the Court of Justice of the European Union (CJEU) and the national courts of the Member States, which is hierarchical but includes the special dialogical mechanism of the preliminary reference procedure. As a third category Rosas proposes 'the "semi-vertical" relation which exists, for instance, between the CJEU and the Strasbourg Court (the ECtHR)'.<sup>61</sup> His fourth category contains dialogues between courts with overlapping or 'competing' jurisdictions. The final category is that of horizontal judicial dialogues, which take place between 'courts which are more or less at the same level'.<sup>62</sup> Obviously the boundaries between the latter two categories become easily blurred. This is illustrated by the reference to the concept of 'constitutional dialogue' in the Dutch literature, in relation to the possibility

56 For more literature in which the 'idea of "dialogue" between the branches is often employed in various ways to reflect the institutional relationship between a democratically elected legislature that makes the laws and an independent judiciary that interprets and applies them in accordance with constitutional values', D. Jenkins, 'Common Law Declarations of Unconstitutionality', 2009 *International Journal of Constitutional Law* 7, p. 183. See also T.R. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998', 2005 *Public Law*, p. 306; R. Clayton, 'Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention under the Human Rights Act 1998', 2004 *Public Law*, pp. 33-47; G. Williams, 'The Constitutional Role of the Courts: A Perspective from a Nation without a Bill of Rights', 2004 *New Zealand Journal of Public and International Law* 2, no. 1, pp. 25-46; Hogg & Bushell, *supra* note 29.

57 *Ibid.*

58 See the contributions by Besselink, Van der Schyff, Efthymiou & De Wit and De Poorter in this special issue: L. Besselink, 'The Proliferation of Constitutional Law and Constitutional Adjudication, or How American Judicial Review Came to Europe After All', 2013 *Utrecht Law Review* 9, no. 2, pp. 19-35; G. van der Schyff, 'When is a Bill of Rights Fit for Judicial Review? The Limitation of Rights Regime in the Netherlands Considered', 2013 *Utrecht Law Review* 9, no. 2, pp. 6-18; N. Efthymiou & J. de Wit, 'The Role of Dutch Courts in the Protection of Fundamental Rights', 2013 *Utrecht Law Review* 9, no. 2, pp. 75-88; J. de Poorter, 'Constitutional Review in the Netherlands: A Joint Responsibility', 2013 *Utrecht Law Review* 9, no. 2, pp. 89-105.

59 W.J. Witteveen, 'Rawls en de toetsende rechter', 2012 *RegelMaat* 27, no. 4, pp. 240-248.

60 A. Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' 2007 *European Journal of Legal Studies* 1, no. 2, pp. 1-16; A. Rosas, 'Methods of Interpretation – Judicial Dialogue', in C. Baudenbacher & E. Busek (eds.), *The Role of International Courts*, 2008, p. 187.

61 Rosas, *supra* note 60.

62 *Ibid.*

of interaction between courts and semi-judicial institutions whose role is still unclear, such as the new human rights institute.<sup>63</sup>

Claes and De Visser have observed that many traditional venues of alleged ‘judicial dialogue’ ([t]he preliminary reference procedure and case law, the formal and official channels of communication available to courts<sup>64</sup>), are less promising in terms of dialogical quality than informal channels of intra-judicial influencing: ‘[e]xtrajudicial exchanges, both in writing and via personal contacts, score much higher as they allow for a free exchange of ideas and arguments on a more equal footing and even give room for deliberation on common issues.’<sup>65</sup> Indeed, we observe a shift in focus among publications on judicial dialogues towards less institutionalized *horizontal* networks of judges. According to Rosenfeld, ‘of special importance in this respect are the international networks among judges working in national, transnational, and international judicial bodies and dealing with issues that are constitutional in nature either from a formal or a functional standpoint. This trend has fostered a real “dialogue among judges”’.<sup>66</sup> Furthermore, the special way of composing constitutional courts – especially the fact that they host so many law professors – has also been pinpointed as ‘an additional and important channel in the transmission of progressive attitudes from the academia to the judiciary.’<sup>67</sup>

As a side note, we would also like to refer to the application of team theory on the judiciary.<sup>68</sup> The main aim of adjudication according to this theoretical approach is to decide as many cases as ‘correctly’ as possible. Although the main point of analyses based on team theory is to see whether notable features of the judiciary emerge endogenously in such a setting, as a logical consequence of the effort by the ‘judicial team’ to organize itself effectively, it can also shed some light on the phenomenon of lower court deviation from its superiors. In this model, even though the judiciary has no substantive reason to promote certainty or uniformity, these qualities will emerge as collateral consequences of the organizational aim of getting the decisions right as a team. We see possibilities for extending partnership theory, which traditionally always includes the legislature as one of the dialogic partners, to the judiciary by connecting to team theory, which, so far, has not tended to use the concept of ‘dialogue’ explicitly.

### 3.2.4. Courts and citizens

Commonly, concerns regarding the countermajoritarian dilemma lying behind this willingness to break the traditional monopoly of the courts (and legislatures) were deemed to have preference over constitutional interpretation and to give up hierarchical mechanisms in favour of heterarchical ones. However, within the institutionalist tradition efforts were made to include ‘the people’ in dialogues involving the judiciary. Equilibrium theories focus on the judiciary’s capacity to facilitate society-wide constitutional debate.<sup>69</sup> According to Bateup these theories provide a much more promising account of constitutional dialogue than the coordinate construction theories and theories of judicial principle. The central assumption here is that if a (highest) court strays too far from what the other branches of government and the people accept its announcements, political constraints such as the power of judicial appointments and popular backlash will bring this court back into line. In the Dutch context this concern has been voiced by the

63 P.B.C.D.F. van Sasse van Ysselt, ‘College voor de rechten van de mens en constitutionele toetsing’, 2012 *RegelMaat* 27, no. 4, pp. 225-239: ‘[T]he Council of State will have to ponder its relationship with the [newly established] Netherlands Institute for Human Rights. It would make sense for the Council to not only keep an eye on the work programme of the Institute, but also on its “legisprudence”. This will benefit the constitutional dialogue. It could be valuable if possible differences do not come up continuously and are minimized in substantive terms.’ (translation by Meuwese & Snel).

64 See Claes & De Visser, *supra* note 5.

65 *Ibid.*

66 A.M. Slaughter, ‘A Typology of Transjudicial Communication’, 1994 *University of Richmond Law Review* 29, p. 29. For more literature on this particular European judicial dialogue, see L. Scheeck, ‘Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks’, 2007 *GARNET Working Paper*.

67 C. Guarnieri, ‘Courts and Marginalized Groups: Perspectives from Continental Europe’, 2007 *International Journal of Constitutional Law* 38, p. 187.

68 See A.F. Daughety & J.F. Reinganum, ‘Appealing Judgments’, 2000 *RAND Journal of Economics* 31, pp. 502-525; M.C. Dorf, ‘Prediction and the Rule of Law’ 1995 *UCLA Law Review* 42, pp. 651-715; L.A. Kornhauser, ‘An Economic “Perspective on Stare Decisis”’, 1989 *Fordham Law Review* 65, pp. 63-92; L.A. Kornhauser, ‘Adjudication by a Resource-Constrained Team’, 1995 *Southern California Law Review* 68, pp. 1605-1629; J. Rogers, ‘Lower Court Application of the “Overruling Law” of Higher Courts’, 1995 *Legal Theory* 1, pp. 179-204; S. Shavell, ‘The Appeals Process as a Means of Error Correction’, 1995 *Journal of Legal Studies* 23, pp. 379-426.

69 See B. Friedman, ‘Dialogue and Judicial Review’, 1993 *Michigan Law Review* 91, pp. 577-682; Friedman, *supra* note 18; B. Friedman, ‘Mediated Popular Constitutionalism’, 2003 *Michigan Law Review* 101, pp. 2596-2636; Bateup, *supra* note 2.

National Ombudsman, when he predicted that the further the traditional constitutional branches merge into a *unitas politica*, the greater the societal counter-forces that will emerge as an extra-constitutional form of *checks and balances*.<sup>70</sup> More establishment-minded is the focus on the 'partnership' that judges and legal scholars can form. Judges are seen as the 'key audience of scholarly work' aimed at 'offering up prescription to courts and deploying techniques that are capable of ready reception by courts'<sup>71</sup> with status-enhancing effects for both parties.

Beyond institutionalist theories, new governance theories further refine the general call for openness that is part of constitutional dialogue, by developing criteria and mechanisms revolving around the duty to give reasons and transparency. These directly or indirectly help courts to connect with citizens in a dynamic and reciprocal manner. Governance criteria can be incorporated into judgments, which in turn may provide an 'incentive structure for participation, transparency, principled decision-making, and accountability'.<sup>72</sup> The various 'dialogic' ways in which citizens and stakeholders can engage with public decision-making that are being experimented with, need to have implications for judicial decision-making as well. More direct forms of participation, such as public consultation and citizens' initiatives, are being introduced, requiring not only new institutional norms, but also different judicial responses. Friedman emphasizes the role of public opinion as a major force to 'demand that the court responds to changing popular interpretations of constitutional issues'.<sup>73</sup> Popular opinion can reach courts in several ways: through individuals who bring lawsuits to test the bounds of a constitutional decision, by scholarly articles, by formal or informal lobbying by interest groups, by media attention et cetera. He notes that the court plays an important role in this system of dialogue by serving as the facilitator of a broader national discussion about constitutional meaning. The question as Friedman phrases it is 'to what extent popular debate and the ensuing political pressure will lead to the production of stable and broadly supported views on constitutional issues?'<sup>74</sup> In the Netherlands, Vranken has championed the potential for 'constitutional dialogue' in the sense of the deference of the Supreme Court towards 'civil society' in the sense that the court can more actively and explicitly recognize and help shape self-regulation.<sup>75</sup>

### 3.2.5. Non-judicial actors and citizens

Vranken has also predicted an ever wider scope of the term 'constitutional dialogue', even in practice and mainstream legal scholarship, so as to include – besides the judiciary and the legislature – societal groups, NGOs, administrative authorities and regulators as well as the networks which link these actors, either formally or informally.<sup>76</sup> The view that public discourse eventually helps to form a stable view of constitutional meanings to which courts ultimately adapt their opinions has been further extended to encompass constitutional activities other than 'interpretation' and therefore non-judicial actors. Ackerman, for instance, speaks of 'legitimization through a deepening institutional dialogue between political elites and ordinary citizens'.<sup>77</sup> Bakker stipulates that there are institutional mechanisms beyond law, which implicate constitutional dialogue, either by contributing to the 'stable influencing' or instead by harming the public discourse and decreasing the possibility of widespread and stable views on important constitutional matters.<sup>78</sup> Bakker's main argument is that we need more insights into how to adapt or

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70 A. Brenninkmeijer, 'Unitas Politica', 2012 *Nederlands Juristenblad*, no. 3, pp. 192-193; R.C. Post, 'Fashioning the Legal Constitution: Culture, Courts, and Law', 2003 *Harvard Law Review* 117, pp. 4-112; R.C. Post & R.B. Siegel, 'Legislative Constitutionalism and Section Five Power: Polycentric Interpretation of the Family and Medical Leave Act', 2003 *Yale Law Journal* 112, no. 8, pp. 1943-2060; Bakker, *supra* note 3.

71 S. Bartie, 'The lingering core of legal scholarship', 2010 *Legal Studies* 30, no. 3, pp. 345-369.

72 J. Scott & S.P. Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance', 2007 *Columbia Journal of European Law* 13, no. 3, pp. 565-594.

73 Friedman, *supra* note 18.

74 *Ibid.*

75 J.B.M. Vranken, 'Taken van de Hoge Raad en zijn Parket in 2025', in A.M. Hol et al., *De Hoge Raad in 2025: Contouren van de toekomst van de cassatierechtspraak*, 2011.

76 *Ibid.*, pp. 29-46. This widening of the scope of 'constitutional dialogue' is also one of the main aims of the Tilburg Law School research programme on Constitutional Dialogues.

77 B. Ackerman, *We the People: Transformations*, 1998, pp. 419-503. Cited by M. Tushnet, 'Misleading Metaphors in Comparative Constitutionalism: Moments and Enthusiasm', 2005 *Symposium on the proposed European Constitution Part I: Europe's constitutional moment*.

78 See Bakker, *supra* note 3.

design 'systems of constitutional dialogue in a way which recognizes the central place of the people in ongoing discussion about fundamental values'.<sup>79</sup> The trouble with existing studies regarding participation by 'the people' in societal dialogues is that they do not give us pointers about 'what works'. Assuming that 'the normative desirability of connecting debate and discussion about constitutional values to broader society is clear',<sup>80</sup> we need research on what exact mechanisms work under what conditions at a level where detail matters.

One promising line of research in this regard is the aforementioned anti-instrumentalist application of constitutional dialogue. The instrumentalist theory holds that constitutions in Communist Party-run socialist countries 'have been, and remain, a means of political control by a single party, a way of expressing Communist Party political, economic and social policy in constitutional terms, a method for mobilizing action, and a malleable document subject to redrafting and adoption by a compliant legislature as times and policy changed'.<sup>81</sup> Sidel argues that this approach, which remains the lens through which most foreign understanding of socialist constitutional processes are understood, is no longer adequate for modern socialist states, and argues therefore that an approach of constitutional dialogue should be taken. Sidel refers to constitutional dialogue as a transitional constitutional dialogue and debate, which is utilized with great effectiveness by multiple, overlapping, often conflicting forces within these states to achieve their purposes.<sup>82</sup>

Another venue for further research uses regulation theory to supplement the efforts by constitutional dialogue theories to deal with the dispersion of activities such as constitutional interpretation. As we have seen, constitutional dialogue theory has made some steps towards widening the range of *actors* as constitutional actors or analyzing traditional actors in new roles.<sup>83</sup> Regulation theory adds to this the possibility that these actors employ instruments beyond the law to influence constitutional practice. The integration of insights from behavioural sciences is a key element here. Regardless of whether formal or informal mechanisms are the object of investigation, insights from regulation theory can help hypothesize regarding the effects of specific instruments within those mechanisms (e.g. peer review within networks or transnational codes of conducts).<sup>84</sup> Although concepts such as 'conversation',<sup>85</sup> 'negotiation'<sup>86</sup> and 'conflict'<sup>87</sup> have been explored in the regulation literature, the 'dialogue' lens may provide a useful new perspective as it may accommodate an easier way of making the connection between regulatory practices and constitutional values.

Finally, there are uses of the concept in the literature where 'dialogue', although aimed at an 'ever better constitutional interpretation', is not taking place between 'actors' but between legal fields, e.g. between international law and constitutional law.<sup>88</sup> Another option along those lines is 'a jurisprudential dialogue between European and Islamic legal orders, where the individual tenets of one system are tested against those of the other'.<sup>89</sup> Also, in the field of legal education 'dialogue' is being used as a didactic tool for helping students to develop a less static (and more contextualist) understanding of constitutional law.<sup>90</sup>

Our findings are reflected in the table below. The table provides an overview of the (strands of) literature employing different theoretical approaches in various institutional settings. Although inevitably incomplete, it provides some entry points into the literature for those considering utilizing the concept of constitutional dialogue.

79 See Bateup, *supra* note 2.

80 Bateup, *supra* note 2, p. 1165.

81 See Sidel, *supra* note 14.

82 *Ibid.*

83 See Bakker, *supra* note 3; C. Bateup, 'Expanding the conversation: American and Canadian experiences of constitutional dialogue in comparative perspective', 2006 *New York University Public Law and Legal Theory Working Papers* 44.

84 A.C.M. Meuwese, 'A Regulatory Approach to Global Constitutional Analysis', 2012 *Tilburg Law Review* 17, pp. 311-319.

85 J. Black, 'Regulatory Conversations', 2002 *Journal of Law and Society* 29, no. 1, pp. 163-196.

86 E.g. C. Coglianese, 'The Internet and Citizen Participation in Rulemaking', 2004 *KSG Faculty Research Working Papers*.

87 F. Haines & D. Gurney, 'The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict', 2003 *Law & Policy* 25, pp. 353-380.

88 See Barak-Erez, *supra* note 1.

89 P. Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination', 2006 *International Journal of Constitutional Law* 47, no. 4, pp. 488-516.

90 See Kloppenborg, *supra* note 14, pp. 687- 688 for some 'dialogic' examples she uses to teach constitutional law.

**Table 1** *Publications on constitutional dialogue organized by institutional setting and theoretical underpinning*

	<i>Courts and Legislatures</i>	<i>Courts, Legislatures, Governments</i>	<i>Courts and Courts</i>	<i>Courts and Citizens</i>	<i>Non-judicial Actors and Citizens</i>
<b>Coordinate Construction</b>		Murphy (1986) Paulsen (1994) Fisher (1988) Devins & Fisher (1998) Whittington (1999)			
<b>Judicial Principle</b>	Hogg & Thornton (1999) Hogg (2001), (2007) Hogg & Bushell (1997) Hogg et al. (2007) Roach (2001), (2005), (2007)	Bickel (1962) Perry (1982), (1994) Agresto (1984) Ingber (1994)			
<b>Equilibrium</b>				Friedman (1993), (1998), (2000) Bateup (2006), (2007) Post (2003) Post & Siegel (2003) Bakker (2008)	Bakker (2008)
<b>Partnership</b>	Hiebert (1998), (2003) (2006) Bateup (2006), (2007)		Daughety & Reinganum (2000) Kornhauser (1995) Rogers (1995) Shavell (1995)		
<b>Anti-Instrumentalist</b>				Sidel (2002)	Sidel (2002)
<b>Contextualist</b>					Kloppenbergh (2004)
<b>New Governance</b>				Scott & Sturm (2007)	
<b>Not grounded in any particular theory</b>			Rosas (2007) Claes & De Visser (2012)		Ackerman (1998)

#### 4 Constitutional dialogue: caveats

As has been shown above, the concept of constitutional dialogue is being used in a multiplicity of ways. Among these there have also been critical side notes. Some authors have even reserved specific qualifications for a constitutional dialogue that is not fully reaching its potential and perhaps even having detrimental effects. For instance, Dor distinguishes between 'proper' dialogues – which he calls 'substantive' – and 'improper' dialogues – we do not adopt his qualification of 'formal' here, because



that term is often reserved for ‘official’ dialogic mechanisms. The former are those ‘in which the parties participating are themselves committed to and engaged in a search for a harmonious solution that will contain both the Court’s interpretation of a constitutional question and the legislature’s interest.’<sup>91</sup> In the latter type of dialogue actors do not really engage with the other’s objections, resulting in a situation where ‘the final formal act is that of the legislature, but the final words are those of the Court.’<sup>92</sup> Other criticisms of ‘constitutional dialogue’ include the observation that the concept ‘contradicts the assumption that judicial decisions are final.’<sup>93</sup> Of course, this criticism is only applicable to the conception of constitutional dialogue that focuses on a dialogue between courts and other actors. Besides, it seems questionable whether the criticism is valid, as judicial decisions may need to have ‘finality’ in concrete cases, but their legal consequences can often be separated from their role in the development of constitutional law more broadly speaking.

A further caveat is not necessarily related to the concept of ‘constitutional dialogue’ as such, but rather to the immature state of the research on the issue. A risk of the eclectic use of the term is that legal scholarship has no tools to debunk solutions that are presented as ‘dialogical’, but is only using the popularity of the concept to cover up misuses of power or inequalities in what essentially are hierarchical relationships. Claes and De Visser have pointed out that many classifications of prototypes of ‘dialogues’ can be slightly misleading since they are necessarily incomplete and often seem ‘to presuppose a certain positive quality to all dialogue and thereby disregard interactions that are unpleasant or downright antagonistic.’<sup>94</sup> Indeed, there is a constant risk when using ‘dialogue’ in law that dialogical possibilities will open up, only to be hijacked by actions that are far from dialogical in nature.<sup>95</sup> Some have pointed to the ‘high level of monologue’ that even some scholarly analysis using the notion of ‘dialogue’ contains.<sup>96</sup> The lack of theoretical clarity regarding the concept of ‘constitutional dialogue’ is a problem, because *empirical* analyses and *normative* accounts easily become mixed up in the realm of constitutional law.

One solution is to start out by using ‘constitutional dialogue’ empirically to ‘describe the increasingly interactive process that is taking place in the area of constitutional development between the legislature and judiciary and between national, European and international actors amongst themselves, as well as between actors within the rule of law and those outside.’<sup>97</sup> The step to positioning ‘dialogue’ up there with normative concepts such as ‘checks and balances’ is often temptingly small, though. Indeed, since ‘constitutional dialogue’ is often embraced as a solution in practice, the risk of ‘tunnel vision’ and ‘confirmation bias’ go beyond academic interest. This is especially the case in systems – such as the Dutch one – without a constitutional court to authoritatively distinguish between constitutional practice and constitutional law. If institutional relations are not justiciable, it will harder to discern whether dialogic features of the interaction are merely a part of an empirical reality or a part of ‘how things should be’ according to constitutional doctrine. Also, a strict separation between empirical analysis involving constitutional dialogue and normative uses has its own drawbacks. Bateup, considering various versions of theories in which the concept of judicial dialogue is central, points out that normative theories are often problematic in that they overvalue the role of courts in constitutional decision-making, and that explanatory or descriptive theories that use constitutional dialogue as an empirical concept ‘fail to offer an attractive normative version of what judicial review should accomplish in modern society.’<sup>98</sup>

91 See Dor, *supra* note 8, p. 17.

92 See Dor, *supra* note 8, pp. 17-18.

93 See Bateup, *supra* note 2, p. 1118.

94 See Claes & De Visser, *supra* note 5.

95 H. Lindahl, ‘Privaatrecht is publiekrecht: Vranken en de privatisering van het burgerlijk recht’, 2005 *Nederlands Juristenblad*, no. 36, pp. 1892-1893.

96 M. Tushnet, ‘Misleading Metaphors in Comparative Constitutionalism: Moments and Enthusiasm’, 2005 *International Journal of Constitutional Law* 61, no. 3, p. 262, referencing Hogg & Bushell, *supra* note 29.

97 De Poorter, *supra* note 58, citing, e.g., Hogg & Bushell, *supra* note 29.

98 See Bateup, *supra* note 2, p. 1111-1112.

## 5. Broader implications and practical guidelines

That leaves us with the question of how to overcome these caveats in the practice of legal research. In this section, we provide three guidelines for legal scholars who consider using the concept of constitutional dialogue in their research. First, the concept of constitutional dialogue is applicable beyond dialogue as mere metaphor. It can be utilized as a lens or method, resulting in different types of research and research outcomes. Researchers should be careful when it comes to mixing these diverging approaches (Section 5.1). Second, and somewhat related, the concept of constitutional dialogue can contribute to both empirical and normative analyses of a constitutional system, as long as these types of analyses are not simultaneously the main goal of the research project. We propose to consider – regardless of the nature of the main type of analysis – the nature of the interaction between the two (Section 5.2).

### 5.1. Choosing between a lens and a method

In a good share of the publications we analyzed, the term 'dialogue' is employed as a metaphor. Although the power of the metaphor itself is not to be discarded, the possibilities of this concept move – as proved by several authors – beyond its use as a mere metaphor. We have distinguished at least two additional possibilities: using the concept as a lens or as a method. It is clear that it is tempting for legal scholars to use 'dialogue' as a lens, on the one hand, and subsequently to recommend it as a method, whilst neglecting to stipulate what is behind the metaphor. Before making suggestions as to how to use 'dialogue' to improve different arenas of public decision-making, we submit that researchers first and foremost explicitly choose among these two usages.

As a *lens* the concept of constitutional dialogue is utilized to review current constitutional arrangements (development, interpretation). The usefulness of this lens is nicely illustrated by the reminder from Palmer of the 'vital constitutional need to think about who we want to be engaging in constitutional dialogue – who we want to be exercising public power and safeguarding the exercise of public power through maintaining the rule of law'.<sup>99</sup> This quote implies that the purposeful conception of a certain set of constitutionally relevant interactions as 'dialogue' makes us reconsider traditional assumptions of constitutional roles and task divisions.<sup>100</sup> In other words, by taking a dialogical perspective with regard to the shaping of the most fundamental normative practices of public decision-making, new solutions for constitutional dilemmas may be found. Of course the metaphorical sense of the concept is not eliminated within this approach. The stylized research questions presented in Table 2 below are intended to show how the concept of constitutional dialogue can be usefully employed not 'just' as a metaphor, but to describe or explain constitutional arrangements. A prominent example of the use of 'dialogue' as a lens can be found in Chen's work.<sup>101</sup> He uses the concept of inter-branch dialogue to describe the constitutional politics and the development of a national plan for an integrated system of roads and canals in the United States, by conducting a historical analysis. The lens of 'dialogue' allows Chen to show how 'interaction' played a crucial role in reconciling the views that Congress and several presidents were holding regarding the constitutionality of such projects.

Constitutional dialogue can also be applied as a method. Whereas the metaphor is of some use when 'dialogue' is used as a lens, constitutional dialogue presented as a method urges us to move beyond the metaphorical sense. In this approach, 'dialogue' can function as a genuine way of organizing public decision-making processes, whether or not imposing a set of ensuing procedural norms. The idea of dialogue as a method is therefore ambitious; it comprises the use of the intrinsic properties of 'dialogue' to structure public decision-making in a certain way and possibly also to formulate the *desired* 'rules of the game'.<sup>102</sup> Our literature review showed that this 'method' approach to constitutional dialogue has

99 M. Palmer, 'The Languages of Constitutional Dialogue: Bargaining in the Shadow of the People', 2007 *The 2007 Bora Laskin Lecture*, delivered on 23 January 2007, Osgoode Hall Law School, York University, p. 12.

100 Ibid. Palmer focuses on the dialogue between 'elected politicians' and 'selected lawyers' and explores the differences between 'policy analysis' and 'legal analysis', asking questions about which branch is better placed to carry out which tasks in relation to the interpretation of the law, but his approach of matching capabilities of certain types of actors to their ideal role in a dialogue is certainly more widely applicable.

101 See Chen, *supra* note 1, p. 28.

102 For instance, when the Dutch Government led by Prime-Minister Balkenende organized a wide consultation round as the '100-

been far more popular so far than the use as a lens: it was employed – at least in part – by *all* studied publications.

### 5.2. Choosing between empirical and normative analysis

In the publications we analyzed, the concept of constitutional dialogue has been used both empirically and more normatively. By ‘empirical’ we mean that the concept is being used to *describe* either the ‘rules of the game’ found in constitutional practice and/or the precise actors involved and their contribution to constitutional decision-making. Although we did find such empirical accounts, there is relatively little empirical analysis dealing with the way in which different public actors interact by using the concept of constitutional dialogue. As stated above, the literature on regulatory governance has provided insights from related perspectives of conversation, negotiation and conflict, but there seems to be room for the concept of dialogue as a useful new perspective in this regard. Although Bateup concludes that explanatory theories behind the concept of constitutional dialogues have so far failed to provide a convincing account,<sup>103</sup> we emphasize the possibility of using dialogue to empirically describe constitutional processes. This is closely related to the use of constitutional dialogue as a *lens*. However, the possibility of using the ‘lens approach’ for normative analysis should not be discarded either. Constitutional processes can be reviewed with the aim of arriving at normative statements about the current mode of constitutional development or interpretation (see Table 2 for an abstract example of the type of question that can be asked).<sup>104</sup> However, before we can safely put forward normative claims as to which actors should be involved in what constitutional role, we would do well to invest in a sound understanding of who actually participates in the process of constitutional norm formation within a certain context.

Taking the method approach of constitutional dialogue provides a possible vehicle for a normative account in looking at dialogue as a solution (see Table 2). Of course, when talking in terms of ‘solutions’ the devil is definitely in the detail. This is why the method approach also needs to ask empirical questions regarding the effects of dialogic features in public decision-making. For instance, constitutional systems that have formally adopted the elements of constitutional dialogue can be investigated to this end. The choice between using constitutional dialogue as a lens or as a method and between an empirical and a normative approach ultimately depends on the type of question one is interested in (see Table 2).

**Table 2** Prototypical research questions with different uses of ‘dialogue’

	<i>Empirical</i>	<i>Normative</i>
<i>Dialogue as a lens</i>	‘What do we discover about a particular category of public decision-making if we see it as a dialogue?’	‘Who do we want to be engaging in constitutional dialogue in what role?’
<i>Dialogue as a method</i>	‘What dialogic elements/mechanisms/features are having what effects?’	‘For what problems of public decision-making and to what extent can ‘dialogue’ be a solution?’

## 6. Conclusion

Posner already stated in 1993 that ‘what is missing from law are penetrating and rigorous theories, counterintuitive hypotheses that are falsifiable but not falsified – precise instrumentation, an exact vocabulary, a clear separation of positive and normative inquiry, (...), and above all and subsuming most of the previous points, objectively testable (...) hypotheses. In law *there is the blueprint or shadow of scientific reasoning, but no edifice.*’<sup>105</sup> The different theoretical accounts behind the concept of constitutional dialogue as identified in this article provide a possibility to fill this gap in legal constitutional research.

day dialogue’, its decision not to make the ensuing documents public was appealed, partly on the grounds that a ‘dialogue’ triggers expectations of openness, Council of State (*Raad van State*), 14 October 2009, LJN: BK0116.

<sup>103</sup> See Bateup, *supra* note 2.

<sup>104</sup> See for example Palmer, *supra* note 99.

<sup>105</sup> R.A. Posner, *The Problems of Jurisprudence*, 1993, p. 69, emphasis added.

Although the theoretical accounts are far from being 'penetrating' and 'rigorous', they provide a step forward in theory-oriented legal research. If a legal scholar considers using the concept of constitutional dialogue in legal research he can either explicitly align with one of the theoretical accounts portrayed in this article or develop an alternative account based on these accounts.

In this contribution we have attempted to structure the large, diverse and growing literature employing the concept of 'constitutional dialogue'. We have seen that the use of the concept these days extends far beyond 'dialogues between courts and legislatures' and 'judicial dialogues', which do remain the two best known applications. Rather than reconstructing a 'constitutional dialogue theory' we have explored various theoretical bases for the concepts and tracked how these relate to actor-types (Table 1). Whereas theories encompassing the concept of 'dialogue' used to limit themselves to the new openness among actors within the now classic constitutional *duas politica* of courts and legislatures, newer applications explicitly search for ways of engaging the citizen. Furthermore, legal academics are not just looking at a way to empower citizens in constitutional interpretation, but also when it comes to other constitutional activities, most notably constitution-writing.

Finally, we have listed some caveats for legal practice and scholarship in employing 'constitutional dialogue'. The way forward, we suggest, lies in distinguishing clearly between the use of 'constitutional dialogue' as a 'lens', on the one hand, and as 'method' on the other. Within both uses there is scope and a need for both empirical and normative analysis, only in different ways (see Table 2). When using 'dialogue' as a lens, the challenge is to move from an empirical account of certain constitutional dynamics to a reconsideration of normative questions regarding divisions of power. For 'constitutional dialogue' as method – the most interesting and most underdeveloped use at the same time – the main challenge is gathering insights into the variables that determine if and how dialogic mechanisms work.

## Annex 1

For analyzing the selected sources, we used the following framework of analysis. We first considered the conceptualization of constitutional dialogue employed within the existing literature. Second, we considered the participants in the dialogue. In what institutional setting did the author employ the concept of constitutional dialogue? Who participated? Lastly, we considered the theoretical underpinnings of the approach taken in the studied literature.

### 1. Conceptualization of constitutional dialogue in the article

- a. Definition of dialogue:
  - a. Can a definition/description of dialogue be found in the article?
  - b. If yes, what is the definition?
  - c. Does the definition (or the author's implicit understanding of 'dialogue') refer to a pattern between actors in the dialogue?
  - d. Does the definition (or the author's implicit understanding of 'dialogue') refer to equality/absence of power relations?
  - e. Does the definition (or the author's implicit understanding of 'dialogue') refer to some kind of mutual interaction?
  - f. Does it refer to other aspects?
- b. Synonyms for dialogue
  - a. What other concepts are used for dialogue in the article?
- c. Definition of constitution
  - a. Is a definition/description of constitution given in the article?
  - b. If yes, what is the definition?
  - c. Does the definition refer to stability?
  - d. Does the definition refer to codification elements?
  - e. Does the definition refer to highest norms?
  - f. Not explicitly addressing *constitutional* dialogue
- d. What constitutional activity or process is described in the article? (choose)
  - i. Constitutional interpretation
  - ii. Constitutional review
  - iii. Constitution-making
  - iv. Constitutional change
  - v. Other (please specify)
- e. What is the function of dialogue? (choose)
  - i. Legitimizing
  - ii. Empowering
  - iii. Instrumental
  - iv. Constituting
  - v. Limiting
  - vi. Other (please specify)
- f. Dialogue as a method, lens or metaphor?
  - a. Does the article refer to an instrumental function of dialogue (method)
  - b. Is the concept of dialogue used to *structure* public decision-making (method)
  - c. Is the word metaphor explicitly used in relation to dialogue?
  - d. Is dialogue used to *describe* a certain relationship between actors (lens)



## **2. Participants within the dialogue**

### **g. Participants**

- a. Who are the participants in the dialogue? (choose two or more)
  - i. Constituent authority
  - ii. Courts (indicate level)
  - iii. Legislature
  - iv. Government
  - v. Regulatory agencies
  - vi. Institutions of Constraint (Ombudsman, etc.)
  - vii. Non-governmental organizations
  - viii. Social partners
  - ix. Citizens/public

## **3. Positioning in theory**

### **h. Type of contribution (choose)**

- i. Overview article
- ii. Normative
- iii. Descriptive
- iv. Explanatory
- v. (A-theoretical)

### **i. Reference to constitutional dialogue theory**

- a. Does the article make an implicit or explicit reference to CDT?
- b. If implicit or explicit, what does it say about it?

### **j. Mainstream versus non-mainstream**

### **k. References (embedment in existing knowledge)**

- a. To which authors does the article refer more than once?

### **l. Theoretical approaches**

- a. Does the author mention a theoretical approach taken?
- b. If yes, how does the author describe this approach?
- c. Does the theoretical approach fit into one of the following categories?
  - i. Deliberative theory/Communication theory
  - ii. Coordinate construction theories
  - iii. Theories of judicial principle
  - iv. Equilibrium theories
  - v. Partnership theories/team theories
  - vi. Other (please specify)
- d. Does the author mention other theoretical approaches than his or her own?
- e. If so, what does the author say about these approaches?